IRENE MITCHELL PALLIN

IBLA 90-212 Decided June 22, 1993

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting Indian allotment application CACA 4965.

Affirmed.

1. Indians: Lands: Allotments: Right to Receive--Indians: Lands: Allotments on Public Domain: Lands Subject To-- Indians: Lands: Trust Patent

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

APPEARANCES: Irene Mitchell Pallin, Hoopa, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Irene Mitchell Pallin has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated December 14, 1989, that rejected her Indian allotment application CACA 4965 filed on March 10, 1978. The BLM decision implemented Irene Mitchell Pallin, 80 IBLA 383 (1984), a Board decision holding that there was in existence at the time of filing a trust patent issued to Nancy Burrill in 1907 for the land here at issue, the E½ SW¼, S½ SE¼, sec. 29, T. 10 N., R. 4 E., Humboldt Meridian, Humboldt County, California. The Burrill patent, which the Board concluded had been erroneously canceled in 1957, had continued in effect from 1907 until 1984 and thereafter. The land sought by appellant was then determined not to be subject to allotment. BLM therefore rejected appellant's application. A simultaneous application (CACA 5366) filed by appellant's brother for the same land was also rejected by BLM without objection from the applicant and is not now an issue in this appeal.

A dispute between appellant and her brother that led to litigation in the Federal courts over the land here at issue is described in the Board's opinion in Irene Mitchell Pallin, supra. Much of their dispute centered around actions taken by BLM after 1957 in the belief that the lands at issue were opened to allotment to qualified persons because the Burrill patent had been cancelled in that year. In our 1984 Pallin decision, however, we found that "the record does not indicate that any of the interested parties [heirs of Nancy Burrill] were afforded an opportunity for a hearing concerning the cancellation of the [1907 Burrill] trust patent." Id. at 390-91. Concluding that this was a denial of due process guaranteed by the Constitution, we

then held "[t]herefore, the [1957] cancellation * * * was void and of no effect." Id. at 391. This holding was at odds with an assumption made by the parties up to that point that the Burrill patent had been cancelled. It gave a new dimension to administration of the land at issue, which, between 1957 and 1984, was believed to be unappropriated land.

The decision here under review rejected appellant's allotment application because the land sought by her remained patented under the 1907 trust instrument which continued in effect. The property was found not to be
open to disposition by BLM under the public lands laws, including section 4 of the Indian General Allotment Act of February 8, 1887, 25 U.S.C. § 334 (1988). BLM concluded that any entitlement by appellant to the patented land depended on her status as an heir to her grandmother's allotment.
On appeal, appellant has countered this finding with an argument that
she "homesteaded" the property so as to acquire exclusive ownership of it. It is also argued that she "won" the property in a "lottery drawing process" following the invalid cancellation of the Burrill patent in 1957. Finally, she contends that she prevailed in the Federal litigation mentioned above, the conclusion of which in 1974 "awarded ownership of the property" to her.

[1] Section 4 of the Indian General Allotment Act provides that any Indian for whose tribe no reservation has been provided and who makes settlement on "lands of the United States not otherwise appropriated" and files an application with the Department is entitled to an allotment of such land. 25 U.S.C. § 334 (1988); Indian Allotments, 28 L.D. 564, 569 (1899). In this case, it is the status of the land upon which appellant has settled that is brought into issue by her application, although her arguments made on appeal ignore the fact that the land she sought to acquire by her application in 1978 was patented to her grandmother in 1907 and was therefore "otherwise appropriated." See Indian Allotments, supra at 565. Our prior decision of this controversy established that the Burrill patent was never properly cancelled and that the land so patented was not subject to acquisition by anyone else claiming under section 4 of the Indian General Allotment Act so long as that grant continued in effect. Pallin, supra at 391. Appellant has not directly questioned our holding in Pallin that found the Burrill patent was a subsisting grant, nor is there any suggestion by her that
this holding was itself incorrect. Nonetheless, there is implicit in
the positions that she takes an assumption that our prior decision in
this matter has been annulled. This assumption is without foundation.
If there is a challenge to a prior decision that may be considered by
the Board, an appellant must show that the decision was in error in some material way if the Board is to reverse itself. See generally Ben Cohen, 103 IBLA 316 (1988), aff'd sub nom. Sahni v. Watt (D. Nev. Jan. 14, 1991). Since no such showing has been made in this case, we therefore adhere to
our holding in Pallin that the 1907 patent to Burrill was not properly cancelled by BLM in 1957, but continued in effect until 1984 and thereafter. See generally Regulations, 30 L.D. 546, 547 (1901); Lizzie Bergen, 30 L.D. 258 (1900), concerning contests against Indian trust patents.

Having found that the patent continued in effect, we then determined in Pallin at 391 that "all [BLM] actions subsequent to the putative cancellation of the trust patent in 1957 are void and of no effect." The effect of this holding was that administrative actions taken on patent applications by appellant and her brother following the 1957 cancellation action were nullified. The "lottery" or drawing upon which appellant now relies to support her 1978 application was one of the actions so voided. The reason the 1957 drawing was void was that the land patented to Burrill, which was the subject of the drawing, was not then subject to allotment because it was previously allotted in 1907. This circumstance has not changed, nor has appellant pointed to any error in our 1984 holding that the Burrill patent continued uninterrupted from 1907 at least until 1984. Nor has she brought a contest against the Burrill allotment, and even if she had, such action would not necessarily validate her claim to the land. See Instructions, 32 L.D. 17, 20 (1903) ("Third parties are never invited to attack allotments with the expectation or hope of securing any advantage by reason of such attack").

Appellant also argues that she prevailed in Federal litigation described in detail in our earlier decision of this matter. That litigation, however, concerned separate 80-acre trust patents for the Burrill tract issued to appellant and her brother after the attempted cancellation in 1957, when it appeared that the Burrill patent was void. Ultimate ownership of the property was not determined by the Federal litigation, which simply determined the standard to be applied when evaluating the patents that were issued to appellant and her brother after 1957 but were later cancelled by BLM. See Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Pallin, supra at 391-92. The Federal litigation upon which appellant now relies concluded in 1974 with an order remanding the case to the Department to permit BLM to determine whether a patent might issue to appellant using standards announced by the court's decision. See Pallin v. United States, 496 F.2d at 34, 35; Pallin, supra at 385. The necessary Departmental determination was not completed, however, until our 1984 decision issued. We then found the Burrill allotment was not properly cancelled in 1957 and the focus of inquiry shifted from the status of the applicants (the issue that had principally occupied the Federal courts) to the status of the land that was the subject of their applications.

To implement our 1984 decision, BLM has now determined that the 1907 Burrill allotment should not be cancelled. The December 1989 decision here under review found that "the lands [comprising the Burrill allotment] are still patented, and are not open to disposition by BLM under the public land laws" (Decision at 2). The 1989 decision then concluded that "[e]ach * * * applicant's entitlement to * * * the trust patented land depends on his or her status as a legal heir to the Burrill Allotment." Id. Immediately following issuance of this decision on December 14, 1989, the State Director informed the Solicitor's office of the action taken and stated that "BLM is correcting the records to reflect the 1984 [Pallin] decision of the Board of Land Appeals that (1) BLM's cancellation of the patent is void and of no effect, and (2) Nancy Burrill's trust patent is still in effect on those lands." See Memorandum dated Dec. 26, 1989, from State

Director, BLM, to Regional Solicitor, Pacific Southwest Region. The practical effect of this decision was to transfer administration of the Burrill land from BLM to the Bureau of Indian Affairs (BIA) to permit probate of the Burrill trust estate. See Indian Allotments, supra at 567; Regulations, 22 L.D. 709 (1896). BIA has acknowledged that administration of this matter will now be handled as a probate of an Indian trust estate (or, more likely, as a series of probates), which is expected to be complicated by the age of this case, among other factors. See Memorandum dated Jan. 17, 1990, from Acting Area Director, BIA, to Office of the Solicitor, Pacific Southwest Region ("expect a considerable delay in processing the subject case"). 1/

It is suggested by her statement of reasons that appellant anticipated that BLM would take action to once again cancel the Burrill trust allotment following issuance of our 1984 Pallin decision, and expected that BLM would repeat an evaluation of the applications made by her and her brother in 1978 in much the same way as the allotment applications they made in 1957 for the identical lands were handled. See Pallin, supra at 384. This action was neither contemplated nor required, however, by our 1984 decision, although dicta in the opinion did discuss several possible actions BLM might take when the matter was remanded to it. Nonetheless, our decision did not require BLM to reach any specific result, but was limited to a caution that BLM "take any other appropriate action authorized by law" in light of the continuing validity of the Burrill patent. Id. at 392. BLM has now done so by confirming the validity of the Burrill patent and rejecting the two pending applications by appellant and her brother for the patented land. We find no error in the action so taken. It is consistent with the observation made in Pallin at 384, that "[t]here is nothing in the record to suggest fraud on the part of the allottee [Burrill]." This observation continues to be an accurate appraisal of the record as it now appears before us. Appellant has not shown otherwise, and has made no argument and offered no proof tending to show that her grandmother's patent was not a prior valid grant. Consequently, we affirm the decision by BLM to recognize the 1907 trust patent.

We therefore conclude that BLM properly implemented our 1984 decision in Pallin by recognizing the continued existence of the Burrill patent. As a consequence, the pending application for allotment of the land comprising the Burrill patent filed by appellant in 1978 was correctly rejected because the land was then otherwise appropriated by the patent issued to her grandmother in 1907. The action taken by BLM was appropriate action authorized by law and is approved as such. As a consequence, further administration of the Burrill trust estate will proceed within the Department under the administration of BIA.

1/ An action in the nature of mandamus to compel BLM and BIA to implement the 1984 decision was filed by appellant's brother on Sept. 12, 1990, and is currently pending in United States District Court. Edward Mitchell, Jr. v. Bureau of Land Management, CIV-S-90-1159 MLS EM (E.D. Cal.).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge